

STATE OF UTAH COMMENTS

on

RIGHT-OF-WAY APPLICATIONS

by

PRIVATE FUEL STORAGE, LLC

TO USE PUBLIC LANDS
FOR NUCLEAR WASTE ACTIVITIES

SUBMITTED TO THE
UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

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TABLE OF CONTENTS

	Page
I. The Cedar Mountain Wilderness Area Prohibits BLM from Granting PFS’s Application for a Right-of-Way to Use Public Lands to Construct and Operate a 32 Mile-Long Rail Line.	1
II. BLM Must Deny PFS’s Right-of-Way Application to Use Public Lands for Nuclear Waste Intermodal Operations.	3
A. Legal Requirements Applicable to the Grant of a Right-of-Way to PFS for the Intermodal Site.	3
1. The Federal Land Policy and Management Act (FLPMA).	3
2. The National Environmental Policy Act (NEPA).	4
3. BLM Right-of-Way Regulations, 43 C.F.R. Part 2800.	4
B. PFS’s Plans for the Operation of the Intermodal Facility Are <i>Ad Hoc</i> and Will Lead to National Security Risks, Significant Environmental Impacts, and Adverse Effects on Users of the Area near the Intermodal Site.	5
C. PFS Has Not Demonstrated That it is Technically and Financially Capable of Constructing, Operating, Maintaining, and Terminating Use of Proposed Intermodal Site.	11
1. PFS has Not Demonstrated it Is Technically Capable of Handling the Unprecedented Volume of Spent Fuel it Intends to Store and Process at the Proposed Intermodal Site.	11
2. PFS Has Not Demonstrated That it is Financially Capable of Constructing, Operating, Maintaining, and Terminating Use of the Proposed Intermodal Site.	13
3. If BLM Does Not Summarily Reject PFS’s Application, it Must Obtain More Information on PFS’s Operational Plans for the Intermodal Site, Obtain Verified Documentation on PFS’s Current Corporate Structure, and Obtain Other Information.	16
a. Receipt Rate of High Level Nuclear Waste Casks and Effects of Using Skull Valley Road as a Transportation Corridor.	16

b.	PFS’s Current Corporate Structure and Financial Support.	17
D.	PFS’s Intended Use of Federal Lands Presents a National Security Risk and Terrorist Target.	19
1.	Transfer and Storage of Spent Nuclear Fuel at PFS’s Proposed Intermodal Site Presents an Unacceptable Terrorist Target.	19
2.	PFS’s Spent Nuclear Fuel Transfer and Storage Operations at the Proposed Intermodal Site Presents an Unacceptable Risk to National Security.	21
E.	PFS’s Outdated Application, as Well as the Outdated and Deficient EIS Issued by the NRC in 2001, Does Not Support BLM’s Action	22
1.	BLM’s NEPA Analysis on the Use of Public Lands Does Not Evaluate the No Action or Other Alternatives.	22
2.	The Unanalyzed Environmental Impacts and Safety Hazards Resulting from PFS’s Use of Public Lands Present Grounds for BLM to Reject PFS’s Application.	26
3.	The Specific Acreage That Is the Subject of PFS’s Application for the Use of Public Lands Requires Further Public Notice and NEPA Analysis.	30
F.	Allowing PFS to Use Public Lands for a Nuclear Waste Intermodal Facility Will Interfere with Users of the Area Adjacent to the Intermodal Site, Will Not Be in the Public Interest, and Will Create a Competitive Disadvantage to Others.	30
1.	Allied Waste Lakeside Municipal Waste Landfill at Lakeside.	31
2.	The Balefill on the Skull Valley Goshute Indian Reservation.	31
3.	Adjacent Utah Trust Lands.	32
4.	Other Users	33
5.	Effects on Competition.	33
G.	The Public Interest and Public Policy Do Not Lie in Granting PFS a Right- of-Way.	33
III.	Because the Pony Express Resource Management Plan Prohibits Public Lands to Be Used for PFS’s Intended Purposes, BLM Cannot Approve PFS’s Application but it May Deny It.	34

A.	The Pony Express Resource Management Plan Prohibits Public Lands to Be Used for PFS’s Intended Use.	34
B.	If BLM Desired to Grant a Right-of-Way to PFS for the Intermodal Site, BLM Would First Be Required to Amend the Pony Express RMP.	36
C.	BLM Cannot Amend the RMP or Grant a Right-of-Way to PFS for the Intermodal Site Unless and Until the Department of Defense Complies with Section 2815 of the National Defense Authorization Act for Fiscal Year 2000.	37
D.	BLM Can Act Now to Deny PFS’s Right-of-Way Application but it Cannot Proceed to Approve Any Right-of-way Applications Unless and Until it Amends the Pony Express RMP and the U.S. Department of Defense Complies with Pub. L. 106-65.	38
IV.	Conclusion	40

**STATE OF UTAH COMMENTS
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The State of Utah hereby responds to the U.S. Bureau of Land Management's February 7, 2006, Federal Register notice requesting public comments on two right-of-way applications initially filed by Private Fuel Storage, LLC (PFS) in 1998. 71 Fed. Reg. 6286 (2006). BLM must deny both of these PFS applications now because PFS's intended use of public lands is not in the public interest; is prohibited by law and the Pony Express Resource Management Plan; and PFS is not technically and financially able to construct, operate, maintain, and terminate a railroad or intermodal transfer facility on these public lands.

Private Fuel Storage, LLC has a license from the U.S. Nuclear Regulatory Commission (NRC) to store up to 4,000 casks of high level nuclear waste (spent nuclear fuel), about 50 miles from Salt Lake City, on the Skull Valley Goshute Indian Reservation in Tooele County. Each year PFS intends to ship up to 200 casks of high level nuclear waste through Morgan, Summit, Weber and Davis Counties to the Salt Lake City rail yards.

The only way PFS plans to transport high level nuclear waste casks from the Union Pacific mainline in Tooele County to the Reservation is to obtain rights-of-way over public lands from the U.S. Bureau of Land Management (BLM).¹ In 1998, PFS applied to BLM to use two parcels of federal public lands – one at Skunk Ridge, to build and operate a 32 mile long rail line along the base of the Cedar Mountains, from I-80 at Low, to the Reservation; the other, for the intermodal transfer of nuclear fuel casks from rail cars to oversized semi-trailer trucks, near I-80 and Rowley Junction /Timpie.

For the reasons discussed below, the BLM must deny both of PFS's right-of-way applications outright. The State will first address PFS's application to use public lands to build and operate a 32 mile long rail route at Skunk Ridge, then address PFS's request to use public lands for the transfer of high level nuclear waste casks from rail cars to oversized, overweight trucks in an area contiguous with the I-80 frontage road, near the I-80 exit at Rowley Junction/Timpie.

I. The Cedar Mountain Wilderness Area Prohibits BLM from Granting PFS's Application for a Right-of-Way to Use Public Lands to Construct and Operate a 32 Mile-Long Rail Line.

PFS has applied to BLM for a right-of-way over a portion of public lands that has now become the Cedar Mountain Wilderness Area. As the Federal Register notice correctly notes:

Public Law 109-163, the National Defense Authorization Act for Fiscal Year 2006, was signed by President Bush on January 6, 2006. 119 Stat. 3136. Section 384 of this Act designated certain lands as the Cedar Mountain Wilderness Area and withdrew these lands "from all forms of entry, appropriation, or disposal under the public land laws, from location, entry, and patent under the United States mining

¹Exhibit 1 (Area Map of PFS's proposed transportation routes, PFS License Application to NRC ("LA") (Rev.2) Figure 1-1).

laws, and from disposition under all laws pertaining to mineral and geothermal leasing, and mineral materials, and all amendments to such laws.”

71 Fed. Reg. 6286 (2006)(*quoting* Public Law 109-163).

It is undisputed that at least three miles of PFS's proposed rail route transects the Cedar Mountain Wilderness Area. PFS described its rail route in an August 28, 1998, letter to Glenn Carpenter, BLM District Manager, as originating from “the Union Pacific mainline at Low Junction south of I-80 and proceed[ing] along the western side of Skull Valley for 32 miles on BLM land to the Goshute Reservation.” As part of its letter, PFS enclosed Figure 2.1-1 and drawings 0599602-EY-10, 11, 12 and 13. The State has overlain PFS's rail route, section by section, as described in PFS's aforementioned drawings, on top of the map that accompanied the proposed wilderness legislation.²

BLM acknowledges that granting the right-of-way is not consistent with management of the wilderness area. As stated in the Federal Register notice: “Because a rail line would be incompatible with wilderness, designation of the Cedar Mountain Wilderness Area would appear to preclude the grant of a right-of-way for the proposed rail line and shift the focus of this project to the ITF [intermodal transfer facility] alternative.” 71 Fed. Reg. 6286.

It is clear that under Subchapter V of BLM's organic statute, the Federal Land Policy and Management Act (FLPMA), which governs rights-of-way, the Secretary of Interior is not authorized to grant a right-of-way in a wilderness area:

The Secretary [of Interior], with respect to public land . . . and, the Secretary of Agriculture, with respect to lands within the National Forest System (except in each case land designated as wilderness), are authorized to grant, issue or renew rights-of-way over, upon, under, or through such lands . . .

43 U.S.C. § 1761(a) (*emphasis added*). Moreover, the Wilderness Act prohibits mechanical transport or any structure or installation within a wilderness area. 16 U.S.C. § 1133(c).

Accordingly, BLM cannot issue PFS's requested right-of-way to build and operate its proposed rail route. BLM should, therefore, summarily deny this PFS right-of-way application.

²See Exhibit 2 (map accompanying the Cedar Mountain Wilderness Legislation); and Exhibit 3 (Declaration of Jean Braxton and overlay of PFS's rail route on the Cedar Mountain Wilderness map).

II. BLM Must Deny PFS's Right-of-Way Application to Use Public Lands for Nuclear Waste Intermodal Operations.

PFS's second right-of-way application to BLM is for 21 acres of public land between the Union Pacific rail line and the I-80 frontage road, at Rowley Junction/Timpie, located 1.8 miles west of the intersection of I-80 and Skull Valley Road. During the requested 50 year right-of-way term, PFS desires to use public land to construct and use rail tracks, a service road, and a building housing a crane, where spent nuclear fuel transfer operations would be processed. From the intermodal site, each spent nuclear fuel cask would be transported via the Skull Valley Road to PFS's licensed storage site on the Skull Valley Goshute Indian Reservation.

BLM should not grant PFS a right-of-way for the intermodal site because the requested use violates the FLPMA, 43 C.F.R. Part 2800, the Pony Express Resource Management Plan, and Section 2815 of the National Defense Authorization Act for Fiscal Year 2000. In addition, the outdated and incomplete Environmental Impact Statement for the PFS project conducted by the NRC, and joined by BLM as a cooperating agency, does not support the grant of a right-of-way.

A. Legal Requirements Applicable to the Grant of a Right-of-Way to PFS for the Intermodal Site.

1. The Federal Land Policy and Management Act (FLPMA).

One key requirement under BLM's organic statute for managing public lands, the Federal Land Policy and Management Act, is that BLM

shall, with public involvement and consistent with the terms and conditions of this Act [FLPMA], develop, maintain and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands.

43 U.S. C. § 1712(a). The Pony Express Resource Management Plan, dated January 1990, is the land use plan for the area that includes the tract for PFS's proposed intermodal site.

FLPMA also imposes legal requirements on BLM's grant of rights-of-way across public lands. In "designating right-of-way corridors and in determining whether to require that rights-of-way be confined to them, [BLM] shall take into consideration national and State land use policies, environmental quality, economic efficiency, national security, safety, and good engineering and technological practices." 43 U.S.C. § 1763. FLPMA further directs that each right-of-way permit contain terms and conditions necessary to:

- (i) protect Federal property and economic interests; (ii) manage efficiently the lands which are subject to the right-of-way or adjacent thereto and protect the other lawful

users of the lands adjacent to or traversed by such right-of-way; (iii) protect lives and property; . . . and (vi) otherwise protect the public interest in the lands traversed by the right-of-way or adjacent thereto.

43 U.S.C. § 1765(b).

2. The National Environmental Policy Act (NEPA).

NEPA requires an environmental impact statement (EIS) for “major federal actions significantly affecting the quality of the environment.” 42 U.S.C. § 4332(2)(C). The U.S. Nuclear Regulatory Commission issued a final Environmental Impact Statement³ for the PFS project in December 2001. BLM acted as a cooperating agency in NRC’s EIS. Only when BLM issues a record of decision and documents the basis for its actions on the use of public lands, will BLM officially determine whether it relies wholly on NRC’s EIS to sustain its NEPA analysis. However, the 2001 EIS is deficient; it contains omissions and out-dated information and analysis.

BLM’s action for the PFS project is either to deny or grant PFS its right-of-way application. As described in more detail below, BLM’s action on the right-of-way for the intermodal is “major federal action” and that action will have a significant effect on the quality of the environment

3. BLM Right-of-Way Regulations, 43 C.F.R. Part 2800.

BLM has codified in regulation the following objectives for its right-of-way program:

It is BLM’s objective to grant rights-of-way under the regulations in this part to any qualified individual, business, or government entity and to direct and control the use of rights-of-way on public lands in a manner that:

- (a) Protects the natural resources associated with public lands and adjacent lands, whether private or administered by a government entity;
- (b) Prevents unnecessary or undue degradation to public lands;
- (c) Promotes the use of rights-of-way in common considering engineering and technological compatibility, national security, and land use plans; and
- (d) Coordinates, to the fullest extent possible, all BLM actions under the regulations in this part with state and local governments, interested individuals, and appropriate quasi-public entities.

³*Final Environmental Impact Statement for the Construction and Operation of an Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County*, NUREG-1714 (Dec. 2001), U.S. Nuclear Regulatory Commission.

43 C.F.R. § 2801.2. BLM's regulations also describe lands available for grants:

(a) In its discretion, BLM may grant rights-of-way on any lands under its jurisdiction except when:

- (1) A statute, regulation, or public land order specifically excludes rights-of-way;
- (2) The lands are specifically segregated or withdrawn from right-of-way uses; or
- (3) BLM identifies areas in its land use plans or in the analysis of an application as inappropriate for right-of-way uses.

43 C.F.R. § 2802.10. Finally, BLM regulations for the denial of a grant of a right-of-way state:

(a) BLM may deny your application if:

- (1) The proposed use is inconsistent with the purpose for which BLM manages the public lands described in your application;
- (2) The proposed use would not be in the public interest;
- (3) You are not qualified to hold a grant;
- (4) Issuing the grant would be inconsistent with the Act, other laws, or these or other regulations;
- (5) You do not have or cannot demonstrate the technical or financial capability to construct the project or operate facilities within the right-of-way; or
- (6) You do not adequately comply with a deficiency notice (see § 2804.25(b) of this subpart) or with any BLM requests for additional information needed to process the application.

43 C.F.R. § 2804.26.

B. PFS's Plans for the Operation of the Intermodal Facility Are *Ad Hoc* and Will Lead to National Security Risks, Significant Environmental Impacts, and Adverse Effects on Users of the Area Near the Intermodal Site.

Now that the Low rail spur is not an option for PFS's local transportation of high level nuclear waste casks to the Reservation, the other alternative PFS has presented is to conduct intermodal operations on public lands. Here, spent nuclear fuel casks will be handled, stored and processed for vehicle shipment to PFS's licensed storage site on the Skull Valley Goshute Indian Reservation.

The intermodal site is located between the Union Pacific mainline and right-of-way, and the I-80 frontage road, 1.8 miles west of Rowley Junction/Timpie. Traffic passing the proposed intermodal site along the I-80 frontage road includes vehicles traveling to and from U.S. Magnesium Corporation (formerly MagCorp, one of the largest employers in Tooele County⁴) and to the new Allied Waste Municipal Landfill (see below). In addition, military aircraft (including F-16 fighter jets) from Hill Air Force Base fly over the intermodal site en route to the Utah Test and Training Range via Skull Valley. Near the proposed intermodal site is the Timpie Springs Waterfowl Management area – a habitat and nesting area for shorebirds, raptors and other bird species.

PFS proposed the intermodal site before the tragic events of September 11, 2001, occurred. However, when PFS turned its focus on the Low rail spur, any planning for intermodal operations came to a halt. In a post 9/11 world, PFS's plans for operating the intermodal facility are not in the public interest. For example, the intermodal site cannot be adequately secured. As for emergency response, PFS will not have its own emergency response crew; it expects law enforcement and emergency responders from Tooele County to respond to an incident at the intermodal site, along Skull Valley Road or at the Reservation site.

PFS's proposed intermodal facility is not a secure facility. The outer perimeter of the site will be fenced with a 4-strand wire range fence (39 inches high) and the operations area will be enclosed with an eight-foot high chain-link fence. In addition, the intermodal facility will not normally be staffed. The only services will be potable water in an onsite storage tank and a septic tank and drain field sewage system. Operations (restricted to daytime hours) will require a four-person crew, who will also drive the heavy haul truck to and from the Reservation.⁵ Therefore, spent nuclear fuel casks at the right-of-way will be left virtually unprotected while a crew transports a cask to the Reservation site.⁶

⁴In an April 23, 2006 article, the *Salt Lake Tribune* listed Dugway Proving Ground, Tooele County School District, Tooele Army Depot, Deseret Chemical Depot and U.S. Magnesium Corp. as the major employers in Tooele County. See Exhibit 4.

⁵See PFS Application For Transportation and Utility Systems and Facilities on Federal Lands (hereafter "PFS Application to BLM" dated November 22, 1999).

⁶NRC regulations require the following for shipments that are not in heavily populated areas: (1) Rail shipments: one unarmed escort stationed at a location that will permit visual observation of the shipment. (2) Road Shipments: Vehicle occupied by a driver and (a) one other individual who serves as escort or (b) escorted by a separate vehicle occupied by at least two escorts. 73 C.F.R. § 73.37(c) and (d).

The PFS customer base will be nuclear utilities located primarily in the eastern United States. Prior to storage of fuel at the PFS site, the nuclear utility must prepare the fuel rods for dry cask storage. This is done in the spent fuel pool at the reactor site. The fuel rods are taken from pool storage and placed into a spent nuclear fuel canister. The canister is then placed into a transportation cask for rail shipment across country. PFS will use the Holtec HI-STAR 100 transportation cask. Each HI-STAR 100 transportation cask has a shipping weight of 140 tons, a length of 25 feet, a diameter of 11 feet and stores 10 MTU of spent nuclear fuel.⁷

The system for storing spent nuclear fuel rods in dry storage casks was developed for use at reactor sites.⁸ The logic of this is that, if there is a loss of integrity in the canister or storage cask, a detection of excessive radiation, or some other malfunction, the spent fuel canister can be inspected in the spent fuel pool located at the reactor site (or in a hot cell). By contrast, PFS has no way of inspecting or dealing with malfunctioning canisters or dry storage casks.

PFS's plan is to inspect the transportation cask at the Reservation site and reject it if it detects a certain level of contamination. PFS then plans to ship the defective cask back to its owner. Similarly, if PFS detects malfunctioning casks during the time the fuel rods are stored at its Reservation site, it will ship the malfunctioning cask back to the fuel owner.

There is a significant problem with PFS's *ad hoc* plan, which could be to the detriment of Federal property and economic interests: the malfunctioning casks may not be accepted for shipment at the intermodal site by Union Pacific Railroad or rail union workers (*e.g.*, because the cask could violate requirements for integrity of the package). Therefore, the cask would remain at the BLM site. Furthermore, if the utility has completely decommissioned the reactor site, there would be no receiving entity to accept return shipment. Over the course of PFS's proposed 50 year use of the intermodal site, it is not unrealistic to expect some casks will be permanently stored at that site, orphaned and abandoned. Thus, granting PFS a right-of-way for the intermodal facility will not be in accord with FLPMA's directive to protect Federal property and economic interests. 43 U.S.C. § 1765(b)(i).

⁷Exhibit 5 (HI STAR 100 Assembly for Transport (from HI-STAR Safety Analysis Report, NRC Docket No. 71-9261); and photograph of spent nuclear fuel transportation cask with impact limiters and tie downs).

⁸*See e.g.*, 42 U.S.C § 10198 (research and development of dry storage of spent nuclear fuel at civilian nuclear reactor sites).

While PFS's proposed intermodal facility and operations are integral to its ISFSI⁹ operations, they will not be regulated by the NRC under 10 C.F.R. Part 72. Instead, PFS will only be subject to generic NRC regulations, such as having an escort with the shipment or a pilot car for road transport. NRC's decision not to regulate the intermodal facility under Part 72 has the following consequences:

- NRC did not conduct any site-specific analysis of the intermodal facility (*e.g.*, no earthquake analysis or aircraft crash analysis).
- NRC will not regulate the gantry crane used for the transfer of casks from rail car to heavy haul truck.
- NRC will not require PFS to have a decommissioning plan for the intermodal facility.
- PFS is not required to have any funds escrowed to deal with accidents, abandoned casks, or to decommission the intermodal facility.

Again, Federal property and economic interests are at risk from PFS's use of the intermodal site.

The PFS project will generate rail shipments of up to 4,000 casks of spent nuclear fuel.¹⁰ The shipments will pass through Morgan, Summit, Weber and Davis Counties to the Salt Lake City rail yards.¹¹ At that point those PFS shipments must contend with other east-west rail traffic and also with rail traffic that travels west from the Salt Lake City rail yards before turning off in Tooele Valley along the main north-south rail route to California. It is likely that these busy intersecting commercial rail routes will cause PFS shipments to be delayed and sit in rail yards before reaching the intermodal site.

As part of its intermodal operations, PFS plans to construct a building on public lands where each spent nuclear fuel cask would be handled and processed from a rail car to a heavy haul tractor/trailer. For PFS's intermodal operations to be feasible, PFS must obtain legal use of four acres of Union Pacific land so that it may construct rail sidings off the Union Pacific mainline. If PFS gains permission from Union Pacific to construct rail sidings, PFS will then construct run around rail tracks (on public lands) from the rail siding; those run around tracks will traverse

⁹NRC describes a dry cask storage facility as an "independent spent fuel storage installation" or "ISFSI," which it regulates under 10 C.F.R. Part 72.

¹⁰Exhibit 6 (prototype of PFS's spent nuclear fuel rail car and cask); *see also* http://www.hazmattraining.com/ertc_news-snf-sept-20-05.htm.

¹¹Exhibit 7 (map of Utah showing one and five mile areas around potential PFS rail routes).

through the transfer facility building. An access road from the I-80 frontage road will loop around the intermodal site; it too will traverse through the transfer building.¹²

At the intermodal site, PFS plans to process each spent nuclear fuel transportation cask by off-loading it from a rail car to a heavy haul tractor/trailer.¹³ The heavy haul tractor/trailer is expected to be about 150 to 180 feet long, 12 feet wide and use up to 100 tires to distribute a gross weight of about 225 tons.¹⁴ The anticipated interstate cask shipping rate is expected to be 100-200 casks per year, consisting of one to three casks per shipment.¹⁵ The heavy haul shipping rate along Skull Valley Road could be as high as 6 round trips per week or 312 round trips per year.¹⁶ At that rate, there will be at least one or as many as four casks in storage at the BLM right-of-way site on any given five-day period during PFS's cask transfer operations.

The intermodal site will be a choke point for inbound and outbound PFS high level nuclear waste shipments. If PFS is successful in attracting customers, nuclear waste casks will always be stored at the intermodal site because of the following physical limitations of PFS's storage and intermodal operations, restrictions placed on its NRC license, and PFS's lack of financial resources:

- PFS, a private shipper without any track record of managing or processing high level nuclear waste shipments, will receive no support from the federal government for its shipping campaign. The U.S. Department of Energy (DOE) will not be responsible for any nuclear waste transportation to PFS; it has repeatedly said that the PFS facility is not part of DOE's nuclear waste program. 71 Fed. Reg. 6286-87.

¹²See Exhibit 8 (PFS Environmental Report to NRC ("ER") (Rev. 12), Figure 3.2-1; and ER (Rev.7), App. 4A, Figure 7, color photograph of artist rendering of intermodal facility, looking north from the I-80 median).

¹³Exhibit 9 (heavy haul tractor/trailer truck, including EIS, Fig. 2.15).

¹⁴Exhibit 10 (letter from Ed Boon, Aspen Trailer Group, to Wayne Lewis, Stone & Webster).

¹⁵PFS Application to BLM, ¶ 7(e).

¹⁶PFS's Environmental Report states that ideally each trip from the intermodal facility to the ISFSI transporting a cask loaded with spent nuclear fuel would make a return trip back to the intermodal facility with an empty transportation cask. However, it is probable that an empty cask will not be available at the time the heavy haul tractor/trailer deposits the loaded cask, resulting in a round trip to return the empty transportation cask to the intermodal facility. PFS ER (Rev. 6) at 4.3-6.

- PFS will have only one unit train for its private cross country transportation of nuclear waste casks.¹⁷ Consequently, nuclear waste casks will be stored at the intermodal site to expedite prompt turn around of PFS's unit train.
- PFS says the intermodal site is only capable of receiving a total of three nuclear waste casks in any one shipment.
- The logistics of moving nuclear waste casks on PFS's slow-moving, oversized and overweight semi-trailer trucks, 26 miles down Skull Valley Road (a 20 feet wide road, much of it with no shoulders), where those shipments must compete with other traffic and, at times, ranchers moving cattle along the road, present a dubious and unsafe mode of transportation.
- PFS may only conduct spent nuclear fuel transfer operations during daylight hours and when the temperature is above 0°F. NRC License No. SNM-2513, Appendix Tech.Spec. 4.2.4; EIS at 5-61 and D-21.
- At the Reservation site, the heavy haul truck will be delayed during PFS's procedures for checking cask receipt and during operations to remove the cask from the vehicle.
- By statute, the lease term between PFS and the Skull Valley Band of Goshute Indians is limited to 50 years. 25 U.S.C. § 415(a). PFS and the Band entered into the lease in December 1996. Therefore, by law, PFS's lease with the Band will expire in December 2046.¹⁸ NRC issued PFS a storage license on February 21, 2006. Provided NRC grants

¹⁷The unit train consists of a locomotive, transportation casks and special use rail cars for carrying those casks, associated buffer cars, and a security car. It is important to note that there is nothing in PFS's NRC license or otherwise that commits PFS to a particular number of locomotives, transportation casks, rail cars or heavy haul vehicles. Moreover, given PFS's precarious financial footing (see following section), it would be speculative to consider whether PFS could increase its shipping fleet.

¹⁸According to the statute:

Leases for . . . business purposes . . . with the consent of both parties may include provisions authorizing their renewal for one additional term of not to exceed twenty-five years, and all leases and renewals shall be made under such terms and regulations as may be prescribed by the Secretary of the Interior.

25 U.S.C. § 415(a). PFS and the Band have been performing under the lease contract (among other

PFS a 20 year license renewal, PFS's operational life will be limited to 40 years (*i.e.*, its NRC license would terminate in February 2046).

- At the end of its NRC license term, the operational limits at the ISFSI and intermodal sites may make it impossible for PFS to timely process all spent nuclear fuel casks to be shipped back to the spent nuclear fuel owner or elsewhere. There is a very real possibility that PFS would be incapable of terminating its use of public lands at the end of a 50 year right-of-way term.

The limitations listed above mean that one or more spent nuclear fuel transportation casks will always be sitting at the intermodal site awaiting processing and shipment to the PFS ISFSI on the Reservation or return shipment to the cask owner. Consequently, the intermodal site will be used for storage of spent nuclear fuel.

Finally, transportation casks stored at the unsecured and unmanned PFS intermodal facility, located a few hundred feet from I-80, will present a prime terrorist target, as will casks being transported on a slow moving truck passing under the I-80 overpass and along Skull Valley Road. *See* Part II.D.

C. PFS Has Not Demonstrated That it is Technically and Financially Capable of Constructing, Operating, Maintaining, and Terminating Use of the Proposed Intermodal Site.

1. PFS Has Not Demonstrated it Is Technically Capable of Handling the Unprecedented Volume of Spent Fuel it Intends to Store and Process at the Proposed Intermodal Site.

The PFS venture is not sponsored by the federal government; it is a private enterprise by a limited liability company comprised of a consortium of eight or fewer utilities. The consortium members will not provide staffing for PFS operations. As a new start-up operation, PFS must recruit employees to work at the ISFSI and at the intermodal site. PFS cannot expect to find employees who are familiar with spent nuclear fuel dry cask storage and handling operations. Dry cask storage is a relatively new component for the nuclear industry.¹⁹ Furthermore, nowhere in the

things, the Band has been receiving payments from PFS and PFS has an exclusive use agreement with the Band under the lease). Any effort by PFS, the Band, or the U.S. Bureau of Indian Affairs to change the initial date of the lease would constitute an illegal effort to subvert 25 U.S.C. § 415(a).

¹⁹For example, the Holtec transportation and storage casks PFS intends to use were only licensed by the NRC in 1999 and 2000, respectively. 10 C.F.R. § 72.214.

United States are there intermodal operations similar to those proposed by PFS.

PFS, an inexperienced operator and cash-strapped operation, is undertaking the mass movement of spent nuclear fuel casks. If it fails to perform, the consequences could be grave: inappropriate handling of nuclear fuel casks and employee exposure to radiation; spent nuclear fuel casks parked at rail sidings around the country; casks piled up at the intermodal site, creating an obvious and tempting terrorist target; and the potential that federal lands would not be rid of spent nuclear fuel casks at the end of PFS's 50 year right-of-way grant.

The PFS shipping campaign is unprecedented. During the years 1979 to 1996, there were 147 rail shipments of spent nuclear fuel containing a total volume of 1,057 metric tons (MTU).²⁰ In its latest application to the BLM, PFS describes the volume of shipment through the intermodal facility as follows:

During the initial years of operation until the storage facility reaches its capacity of 4000 stored canisters, it is expected that between 100 to 200 transportation casks will be shipped to the site each year, resulting in two rail shipments on average per week being transferred to trucks at the [intermodal facility] throughout the year. At the end of the storage facility's life, the 4000 canisters will be shipped from the site to the Department of Energy.

PFS Application to BLM, ¶ 7(e). An annual PFS shipping rate of 100 to 200 casks translates into a volume of 1,000 MTU to 2,000 MTU of spent nuclear fuel.

PFS intends to ship in one year, the volume (and number of casks) of spent nuclear fuel that historically has been shipped in a 17 year period. Yet, the intermodal facility will not be a secure facility and will not normally be staffed.²¹ Intermodal operations, conducted only during daylight hours, will require a four-person crew, who will also drive the heavy haul truck to and from the Reservation.²² Furthermore, no analysis has been done to determine whether the intermodal rail sidings will be capable of handling the volume of traffic PFS expects; whether lack of capacity at the intermodal sidings would create a backlog of PFS transportation casks in other rail yards across the country, including those in Salt Lake City and Riverdale, Utah; and whether there would be a

²⁰*Rail Safety and Security: Some Actions Already Taken to Enhance Rail Security, but Risk-based Plan Needed*, GAO-03-435 (April 2003), Table 5 at 54 (<http://www.gao.gov/new.items/d03435.pdf>).

²¹See Part II.D (PFS's use of public lands presents a national security risk and terrorist target).

²²PFS Preliminary Plan of Development ¶ 6.7 (attached to PFS Application to BLM, Nov. 22, 1999).

detrimental effect on the rail transit of other commodities along the Union Pacific mainline.

The PFS plan to move an unprecedented volume of spent nuclear fuel poses a danger to public health and safety. The quantity of spent nuclear fuel that PFS intends to move in each cask – 10 metric tons of uranium – requires PFS to use a 140 ton transportation cask to accomplish that feat. The use of these massive transportation casks makes PFS's proposal to transport each cask on a rural road using grossly overweight and overlength vehicles infeasible and a hazard to public safety (for more detail, *see* Part II.E.2 below). PFS's plan for the movement of 4,000 casks through the intermodal site is further weakened by its lack of financial resources and the restrictions NRC imposed on its license. The physical and operational limitations at PFS's proposed intermodal and Reservation sites described in Section B above, cast serious doubt on PFS's technical capability to safely process high level nuclear waste shipments through the intermodal site.

To date, PFS has not demonstrated it is capable of safely carrying out the unprecedented operations it intends to conduct at the intermodal facility. BLM must, therefore, find PFS is not qualified to hold a right-of-way grant on public lands to conduct intermodal operations and deny the application. 43 C.F.R. § 2804.26(a)(3) and (5).

2. PFS Has Not Demonstrated That it is Financially Capable of Constructing, Operating, Maintaining, and Terminating Use of the Proposed Intermodal Site.

Private Fuel Storage, LLC is a limited liability company. As such, its owners are protected from personal liability for debts of and claims against the company, *i.e.*, only the assets of PFS itself are at risk, not the members' assets. PFS's general scheme for financing its project is that PFS members, through subscription agreements, will directly finance the venture through NRC licensing (the stage PFS is at today). LA at 1-5 (Rev. 13). PFS anticipated its members would also directly finance detailed design plans and preparation of bid specifications as well as contribute six million dollars in equity during construction (although the bulk of construction funds is anticipated to be funded through service agreements with PFS customers). *Id.* As described in more detail below, more and more PFS members continue to back away from any further support of the PFS project.

PFS was composed of 10 member companies when it first became registered as a foreign limited liability company in Utah in 1997.²³ Later that year, when PFS filed its application with the NRC in June 1997, its members had dropped to seven utilities. LA (Rev. 0) at 1-10 (later PFS membership rose to eight). Recently, there has been a renewed erosion of support among PFS

²³The member companies were: Consolidated Edison Co.; Genoa Fuel Tech, Inc.; GPU Nuclear Corp.; Illinois Power; Indiana Michigan Power Co.; Northern States Power Co.; Pacific Gas and Electric Co.; Southern California Edison Co.; Southern Nuclear Operating Co., Inc.; and Wisconsin Electric Power Co. *See* Exhibit 11 (PFS Application to Utah Department of Commerce for Foreign Limited Liability Company Certification of Registration, March 27, 1997).

members, further undermining PFS's original business model.

Many of PFS's members have evinced a lack of support that casts doubt on the viability of the PFS project. As acknowledged in BLM's Federal Register notice and elsewhere:

- In December 2005 PFS's majority interest-holder, Xcel Energy, announced it "will hold in abeyance future investments in the next phase of PFS as long as there is apparent and continuing progress" towards a federal interim storage, reuse, and/or disposal.²⁴
- As of December 7, 2005, PFS member Southern Company "will no longer support PFS."²⁵
- Similarly, Florida Power and Light, another PFS member, announced "PFS is no longer in our strategic interest and that for the foreseeable future we will put no further effort into developing [the PFS] project."²⁶
- PFS member Entergy declared it planned "to hold in abeyance future investments in [PFS] as long as there is apparent and continuing progress towards federally sponsored away-from-reactor storage and disposal."²⁷
- PFS member Southern California Edison ceased funding the PFS venture many years ago and has no plans to utilize the PFS facility.²⁸
- Indiana Michigan Power has not been contributing to PFS for some time.²⁹

See 71 Fed. Reg. 6287.

²⁴R. Kelly letter to Senator Hatch (December 8, 2005); *see also* 71 Fed. Reg. 6287.

²⁵J.B. Beasley, Jr. letter to Senator Hatch (December 7, 2005); *see also* 71 Fed. Reg. 6287.

²⁶L. Hayes, III letter to Senator Hatch (December 13, 2005).

²⁷C.L. Herbert, Jr. letter to Senator Hatch (December 20, 2005).

²⁸South California Edison's member share in PFS has now dropped to 3%.
<http://deseretnews.com/dn/print/1,1442,635170641,00.html>.

²⁹Indiana Michigan's representative to PFS agreed the utility's "investment in PFS was a 'speculative' venture" and "Indiana Michigan no longer is contributing to the [PFS] Consortium." Indiana Michigan Power Co. v. United States, 60 Fed.Cl. 639, 658-59 (2004).

BLM's ability to make a favorable determination on PFS's financial capability is severely hampered because BLM's information on PFS's financial qualifications is obsolete. According to the State's records, PFS last sent financial information to the BLM on July 13, 1999.³⁰ Since that time, PFS's financial "plan" has changed significantly and the financial support by PFS member companies has steadily and inexorably declined.

In the NRC licensing proceeding, PFS made a dramatic change in its financial plan³¹ after the Commission ruled in August 2000³² that PFS must produce a draft of the contract it intended to enter into with customers for storage of spent nuclear fuel at its ISFSI site on the Reservation. By December 2000, PFS's members were no longer committed to placing any equity into construction or operation of the PFS ISFSI; instead, PFS's financial plan calls for the bulk of its funding to come from PFS passing costs through to its customers by way of service contracts.³³

Furthermore, PFS has not yet demonstrated to the NRC that it is financially capable of constructing and operating the 4,000 cask storage site on the Reservation. Under its license from the NRC, PFS may not begin construction of the ISFSI unless and until it demonstrates to the NRC that funding (equity, revenue and debt) is fully committed, that is adequate to construct the facility. PFS ISFSI License No. SNM 2513, Condition 19. BLM should also note that NRC does not require PFS to have a decommissioning trust fund to terminate its use of the intermodal site or carry

³⁰Letter from John Donnell, PFS, to Leon Berggren, BLM, forwarding redacted copy of the PFS amended and restated limited liability company agreement.

³¹LBP-05-20 (redacted), slip op. at 57 ("To be sure, the extensive nature of some of the changes to the PFS financial qualifications scheme, which were proffered less than six months after the Board (or less than two months in the case of the Commission) had placed significant reliance on those terms was unexpected, to say the least").

³²CLI-00-13, 52 NRC 23 (2000).

³³See e.g., CLI-04-10 (*redacted version* as released by CLI-05-08), slip op. at 13 ("Utah's argument that financial soundness requires PFS to have equity payments from members or commercial loans is fact-driven. The Board saw the record otherwise.[] Utah has not shown that the Board erred in finding the plan adequate despite the full reliance on customer service contracts for funding.").

The State is constrained from discussing certain aspects of PFS's financial plans because public NRC decisions have redacted certain aspects of PFS's financial plans and the State also obtained PFS-claimed proprietary information by entering into a confidentiality agreement with PFS, and that agreement restricts the State's use of the information. However, BLM may be able to obtain access to the unredacted NRC decisions and proprietary documents relating to PFS's most recent commitments and financial plans, requisite in evaluating PFS's financial viability.

insurance in case of an accident at the intermodal site.³⁴

The foregoing illustrates that PFS has not (and cannot) demonstrate that it is financially capable of constructing, operating, and terminating an intermodal facility on public lands, and it is, therefore, not qualified to hold the grant. 43 C.F.R. § 2804.26(a)(3) & (5); *see also* 43 U.S.C. § 1765(b).

3. If BLM Does Not Summarily Reject PFS's Application, it Must Obtain More Information on PFS's Operational Plans for the Intermodal Site, Obtain Verified Documentation on PFS's Current Corporate Structure, and Obtain Other Information.

In determining whether to grant a right-of-way to PFS, the BLM (through the Secretary of Interior) has the authority under FLPMA section 501 to require PFS to “disclose those plans, contracts, agreements, or other information reasonably related to the use, or intended use, of the right-of-way, including its effect on competition.” 43 U.S.C. § 1761(b)(1). FLPMA also requires BLM to obtain corporate information prior to granting a right-of-way to a business entity. *Id.* § 1761(b)(2).

BLM has authority under FLPMA section 501 to obtain specific information on PFS's plans, contracts, agreements, and other information relating to PFS's use of the intermodal site, and to obtain verified documentation on PFS's current corporate structure and financial support; BLM should exercise that authority if it intends to keep PFS's application under review. However, BLM already has a sufficient record and basis to reject PFS's intermodal application outright.

a. Receipt Rate of High Level Nuclear Waste Casks and Effects of Using Skull Valley Road as a Transportation Corridor.

As BLM is no doubt aware from its participation as a cooperating agency with NRC in the EIS process, the EIS's focus on any local transportation analysis was not on PFS's activities at the intermodal site but on PFS building and operating a rail spur at the base of the Cedar Mountains. PFS says its cask receipt rate at the intermodal site will be 100 to 200 casks annually. PFS Application to BLM ¶ 7(e). As described in the following paragraphs, this 100 to 200 annual cask receipt rate is divorced from reality and is merely an arithmetic calculation.

On February 21, 2006, NRC issued PFS a license for a 20 year term to store up to 4,000 casks of high level nuclear waste on the Skull Valley Indian Reservation. PFS may receive a renewal of its NRC license for another 20 years if it meets NRC regulatory requirements on or before 2026.

³⁴*See e.g.*, EIS at 5-1 (“NRC would not license the transportation facilities located away from the PFS [facility] and does not require the decommissioning of those transportation facilities.”).

As described in the EIS, PFS intends the operational life to be 40 years. *See, e.g.*, EIS at 2-26; 4-44 Table 4.6. If PFS were to operate for 40 years, then a 100 cask annual receipt rate for 40 years would yield 4,000 nuclear waste casks stored on the Reservation. If operations were only for 20 years, then it would take a 200 cask annual receipt rate for 20 years to yield 4,000 nuclear waste casks for Reservation storage. These computations do not account for return shipments of empty shipping casks; nor do they account for cask shipments at the end of PFS's license term from the Reservation site back across the country to the nuclear waste utility owner (if, in fact, the utility has not decommissioned its reactor site and will be capable of receiving the nuclear waste casks); or of shipments to a permanent repository (if one is available at that time, for receipt of PFS-stored high level nuclear waste). Based on the foregoing, the volume of casks to be processed through the intermodal site is unknown, as is PFS's ability to physically process outbound shipments at the end of its 20-year or 40-year operational life.

Given the physical and operational limitations at PFS's proposed intermodal facility and Reservation sites described in Section B above, and the unknown cask receipt and outbound shipping rates, BLM cannot render a favorable decision without obtaining hard facts and data from PFS on its technical capability to carry out the functions it intends to perform at the intermodal site. To this end, BLM may exercise its authority under FLPMA to require PFS to disclose its plans for the transportation corridor along Skull Valley Road, the heavy haul tractor/trailer specifications, storage contracts or signed customer agreements, and other information so that BLM will have some specificity and a basis for evaluating PFS's use of public lands. To date, BLM does not have an adequate record upon which it can decide that PFS has the capability of safely carrying out its intermodal operations and tying up public lands for 50 years or more. BLM must, therefore, deny the right-of-way application.

b. PFS's Current Corporate Structure and Financial Support

The record before BLM supports a finding that PFS is not financially capable of holding a grant on public lands for its proposed intermodal activities. *See* Part II.C.2. While BLM may have obtained some corporate and financial information from PFS in the past, the obsolescence of that information, and the current public disclosure that a substantial number of PFS members will no longer financially support the venture, call into play FLPMA section 501. Under that provision, in addition to requiring the applicant to disclose the identity of the participants in a business entity, BLM has the authority to require disclosure of the following:

- (A) the name and address of each partner;
- (B) the name and address of each share-holder owning 3 per centum or more of the shares, together with the number and percentage of any class of voting shares of the entity which such shareholder is authorized to vote; and
- (C) the name and address of each affiliate of the entity together with, in the case of

an affiliate controlled by the entity, the number of shares and the percentage of any class of voting stock of that affiliate owned, directly or indirectly, by that entity, and, in the case of an affiliate which controls that entity, the number of shares and the percentage of any class of voting stock of that entity owned, directly or indirectly, by the affiliate.

43 U.S.C. § 1761(b)(2). Applying the foregoing provision to a limited liability business entity, BLM should require specific disclosure, under oath or affirmation, from the applicant, PFS, as to the following, current as of the date of disclosure to BLM:

- The name and address of each PFS member.
- The current percentage of ownership of each PFS member.
- The name and address of each and any PFS affiliate and its percentage of ownership in the affiliate.
- The name and address of any entity who controls PFS, either directly or indirectly, and its percentage of control over PFS.
- A copy of the current Subscription Agreement among PFS members.
- Updates to any corporate information PFS has previously supplied to BLM.

If BLM intends to keep PFS's application under review, it must also ascertain PFS's current financial qualifications. Under PFS's latest business model, it intends to pass all costs through to its customers; PFS members will not put any equity into construction or operation of the ISFSI.³⁵ Accordingly, BLM will not be capable of rendering an affirmative decision on PFS's financial capabilities unless and until it reviews any agreements PFS plans to enter into with its customers or others for financing its project and providing storage services to customers.

The defection of member support for and financial commitment to the PFS venture puts federal property and economic interests at risk, making a grant to PFS antithetical to the public interest. The record before BLM on PFS's financial capability to operate and terminate use of the intermodal site supports rejection of PFS's application but it offers no basis for granting the right-of-way. *See* 43 C.F.R. § 1765(b); 43 C.F.R. § 2804.26(a)(2) - (5).

³⁵*See e.g.,* CLI-05-01 (*redacted version*, as released by CLI-05-08), slip op. at 17 wherein the Commission refers to "PFS's intent to pass **all** costs through to its customers" (*emphasis in original*). *See also* Part II.C.2 *supra*.

D. PFS's Intended Use of Federal Lands Presents a National Security Risk and Terrorist Target.

In addition to environmental and financial risks, PFS's intermodal operations also threaten national security.³⁶ Spent nuclear fuel casks being stored next to I-80 or on a slow-moving truck passing under I-80 will present a prime terrorist target. In the post-September 11 world, the threat of terrorism is real, the target readily available, and the consequences dire. Former Energy Secretary Abraham warned that terrorists will attack any target, use any method, and the terrible events of September 11th demonstrate the importance of maintaining the highest levels of security over nuclear materials.³⁷ The lack of any financial security, the potential for environmental harm, and the threat to national security are unequivocally contrary to the public interest and the language of FLPMA.

1. Transfer and Storage of Spent Nuclear Fuel at PFS's Proposed Intermodal Site Presents an Unacceptable Terrorist Target.

It is adverse to the public interest to generate a virtually continuous stream of targets for terrorists along the rail routes and at the proposed intermodal transfer facility when there is no need for away-from-reactor storage. Alarmingly, NRC admitted that it has "no means to assess, usefully, the risks of terrorism at the PFS facility." CLI-02-25, 56 NRC 340, 350 (2002).

Recently the National Research Counsel Committee on Transportation of Radioactive Waste states it believes that there is "sufficient information available . . . to undertake a substantive review of spent fuel[] transportation security."³⁸ The National Research Counsel Committee recommended:

An independent^[39] examination of the security of spent nuclear fuel [] transportation be carried out prior to the commencement of large-quantity shipments to [] interim

³⁶ See Exhibit 12 (Letter from Commissioner Robert L. Flowers, Utah Department of Public Safety, May 2, 2006).

³⁷ http://commdocs.house.gov/committees/intlrel/hfa75561.000/hfa75561_0.HTM.

³⁸ *Going the Distance? The Safe Transport of Spent Nuclear Fuel and High-Level Radioactive Waste in the United States*, 2006, National Research Counsel Committee on Transportation of Radioactive Waste, National Academy of Sciences, at SR.2 (<http://darwin.nap.edu/books/0309100046/html/6.html>).

³⁹ The Committee recommended the examination be conducted "by a technically knowledgeable group independent of government and free of institutional and financial conflicts of interest." Id.

storage. This examination should provide an integrated evaluation of the threat environment, the response of packages to credible malevolent acts, and operational security requirements for protecting spent fuel . . . while in transport.”

Id. It is not in the public interest to allow PFS to use a BLM right-of-way for receipt, storage and transfer of spent nuclear fuel at the intermodal site until the study suggested by the National Research Counsel has been completed.

Operations at the intermodal facility will present a terrorist target. The expected cask receipt rate is 100-200 casks per year resulting in two rail shipments on average per week. A heavy haul truck will transport one cask at a time to the facility. As the heavy haul truck passes under the I-80 overpass it will present a slow moving target.⁴⁰ Given the restrictions on PFS's ISFSI and intermodal operations, it is likely that only one cask per day will move to the PFS ISFSI site. The only building onsite will be a prefabricated one, where a cask will be transferred from rail car to heavy haul truck. PFS is not required to provide physical security for this site, other than one escort maintaining visual surveillance⁴¹ because NRC considers casks stored at the intermodal transfer facility to be merely in transit. Thus, casks will constantly be stored, unsecured on the PFS rail siding or run around track close to and in plain view from I-80, awaiting transfer from rail car to heavy haul truck.

In the event of a security threat, the closest law enforcement agency would be the Tooele County Sheriff. At a Homeland Security meeting in August 16, 2005, a Tooele County deputy sheriff stressed that Tooele County has only two roving deputies during some shifts to cover the 6,930 square mile county. The county is experiencing rapid growth; its population grew by 10,000 between 2000 and 2005 and is projected to increase by an additional 10,000 between 2005 and 2010. Policing the increasing population will further delay Tooele County law enforcement from timely responding to an incident at the intermodal site. BLM should deny PFS the use of public lands because public safety is threatened by the operations PFS will conduct on those lands. *See* 43 U.S.C. §§ 1763 and 1765(b); and 43 C.F.R. § 2801.2(c)

⁴⁰The ability of the heavy haul vehicle loaded with a spent nuclear fuel cask to fit under the I-80 overpass is questionable. Exhibit 13 (photographs of the I-80 underpass); Exhibit 14 (Deposition Transcript of PFS witness John L. Donnell, May 27, 1999, at 79 (“preliminary information” indicates that there will be “a few inches” of clearance as the tractor/trailers pass under the overpass)).

⁴¹*See* 10 C.F.R. § 73.37(b)(9), (c), and (d).

2. PFS's Spent Nuclear Fuel Transfer and Storage Operations at the Proposed Intermodal Site Presents an Unacceptable Risk to National Security.

The United States Air Force uses Skull Valley as the pathway for over 7,000 fighter jets to enter the Utah Test and Training Range (UTTR) South Range. Some of the fighter jets carry live bombs or inert bombs weighing up to 2000 lbs. Consequently, NRC required PFS to determine the probability of an accidental aircraft or bomb crash into the PFS ISFSI site. Although in 2003 NRC ruled that the probability of an aircraft or bomb crash into the site was too high, in 2004 NRC allowed PFS to evaluate the probability that an accidental aircraft or bomb crash would penetrate a storage cask at the PFS site. In a 2005 split decision, the NRC Licensing Board found the probability that an F-16 or bomb would crash into the PFS facility was barely below NRC's threshold.⁴² See LBP-05-29 (*noting* portions of the decision contain Safeguards Information). Importantly, one of the three administrative law judges, Judge Peter Lam, Ph.D., found that due to "major uncertainties" PFS had not demonstrated it met the NRC safety standard.⁴³ *Id.* at D-1. Judge Lam further found that the PFS analyses were "fundamentally undermined by large inherent uncertainties and narrow safety margins" and, therefore, are unreliable to demonstrate safety. *Id.* at D-7.

The intermodal site, adjacent to I-80 and to the west of Skull Valley Road, is directly under the flight path of military aircraft, a commercial jetway and light aircraft flight path. United States and allied military aircraft make more than 7,000 flights annually over the proposed BLM right-of-way land. The intermodal site is also below a major low level commercial flight path, V32-200, and high altitude route, J154. Flight path V32-200 is the western landing path for the Salt Lake International Airport. Furthermore, the airspace over I-80 is used as an east-west corridor by light aircraft.

There is significant aircraft traffic over the right-of-way site. However, NRC has made no assessment to determine the risks from an accidental or intentional aircraft crash into the proposed intermodal facility. An accidental or intentional crash into spent nuclear fuel transportation casks at the intermodal site would not only present unacceptable health and environmental consequences,

⁴²The analyses conducted on behalf of the State of Utah, contrary to the majority decision, concluded that a canister inside a storage cask would breach. This issue is part of Utah's appeal of NRC's licensing decisions to the D.C. Circuit Court of Appeals (Docket Nos. 05-1420 and 06-1087).

⁴³Similarly, NRC Commissioner Gregory Jaczko dissented in part, finding that the PFS analyses are "fraught with uncertainty." Drawing upon Judge Lam's opinion, he urged that PFS not be licensed barring a demonstration that the radiological consequences of an aircraft or bomb crash are acceptable or physical barriers are installed to protect casks from crashes. CLI-05-19 (2005), slip op. at 27-32. The Commissioner stated that the probability of an aircraft crash is "'about' at the threshold which makes [an accident] credible." *Id.* at 29.

but also would shut down a key national commerce corridor between Utah and Northern California,⁴⁴ impede vital military training, and foreclose access to major hazardous waste and low level radioactive waste disposal facilities.

In addition to adverse economic impacts on the commerce corridor, the intermodal facility will also threaten Utah's economy, which is dependent, in part, on the defense industry. The Rowley Junction/Timpie proposed right-of-way is located near the Utah Test and Training Range. The UTTR includes restricted airspace over Department of Defense and public lands and air space designated as military operating areas ("MOAs"). The UTTR is the largest overland special use airspace within the continental United States. The UTTR, including the MOAs, is an irreplaceable testing and pilot training area, and its continued availability is critical to the military readiness of the United States. Transporting, storing and transferring spent nuclear fuel near the UTTR may encroach on the U.S. military's ability to adequately train pilots and test aircraft and weapons, thereby threatening national security. Any threat to the military readiness of the American troops runs contrary to the public interest.⁴⁵

Granting the right-of-way at Rowley Junction/Timpie poses an unacceptable risk to national security, interstate commerce, Utah's economy, and is not in the public interest.

E. PFS's Outdated Application, as Well as the Outdated and Deficient EIS Issued by the NRC in 2001, Does Not Support BLM's Action.

1. BLM's NEPA Analysis on the Use of Public Lands Does Not Evaluate the No Action or Other Alternatives.

The major federal action relating to BLM is whether to deny or grant a right-of-way to PFS to conduct high level nuclear waste operations on public lands. In addition to complying with its

⁴⁴If I-80 were shut down, east-west interstate traffic to California and the west coast, including commercial shipping and shipments of critical goods, would be diverted (1) from northern Utah through Idaho and northern Oregon, or (2) south through Utah and Arizona, at significant additional time, cost and fuel consumption. Additionally, hazardous waste and low level radioactive waste shipments would face significant delays in rail yards and parking lots across the country.

⁴⁵Any negative impact on UTTR or Hill Air Force Base is detrimental to the public interest. The UTTR is operated by Hill Air Force Base, which is the sixth largest employer in the State of Utah. Activities related to the mission at Hill Air Force Base contribute over three billion dollars annually to Utah's economy. The Air Force may restrict activities near the UTTR if it determines that the risk of a fighter jet or bomb crashing into the intermodal transfer facility is unacceptable. Encroachment on the activities conducted at or near the UTTR threaten the viability of Hill Air Force Base and Utah's economy, and are, therefore, not in the public interest.

*State of Utah Comments to BLM
on PFS's Right-of-Way Applications
May 8, 2006*

regulations, BLM must also comply with NEPA by evaluating whether there is a need for the PFS facility; the no action alternative (denial of PFS's application); other alternatives to PFS's proposed action; and whether BLM's action in granting PFS a right-of-way will significantly affect the quality of the environment.

Early in the EIS process BLM identified the following concerns the PFS project raised under NEPA:

- The security needs for the project and handling of weapons-grade waste should be addressed.
- The impacts on existing utilities such as the Skull Valley Road should be addressed.
- Impacts on private land and changes in land values from the Skull Valley Road should be addressed.
- The discussion on the need for the project should indicate how the project is related to efforts to establish a permanent repository at Yucca Mountain or other locations. It should explain what would happen to the Skull Valley repository if a permanent facility is opened during the life of the project.

Exhibit 15 (Letter from G. William Lamb, BLM State Director, to Dr. Edward Y. Shum, NRC Spent Fuel Project Office, dated June 30, 1998). These concerns still have not been addressed and, as discussed elsewhere in these comments, some of the impacts from the PFS project are significant (*e.g.*, use of Skull Valley Road and threats to national security).

While the current EIS and PFS's application to BLM do not provide a sufficient basis for BLM to rely on for its NEPA analysis, as time has passed, other NEPA issues have come to the fore. In particular, the need for the PFS facility and expected public benefits. On BLM's application form for the use of public lands, question 15, in part, asks the applicant to "[p]rovide statement of need for project, including the economic feasibility . . . and . . . expected public benefits." PFS responded as follows:

The Nuclear Waste Policy Act of 1982, mandated that by 1998, the Department of Energy (DOE) provide permanent disposal sites for spent nuclear fuel from the nation's commercial nuclear power plants. However, the DOE has not met its 1998 deadline and will not be able to provide permanent storage until at least 2010. As a result, utilities have been forced to provide interim storage for their spent fuel beyond 1998. The PFS [facility] allows storage for those plants, which may be unable to increase their own storage space or where increased on-site storage might be economically disadvantageous. The PFS [facility] may be the only alternative to premature shutdown of a power plant resulting in the loss of electrical power to the

public. It also allows nuclear power plants that are permanently shutdown to remove all the spent fuel from the site and decommission. Construction of the ITP is an integral part of the PFS [facility] project. . . .

PFS Application to BLM (Nov. 22, 1999).

There is no longer a demonstrated need for storage at PFS's proposed dry cask storage facility (ISFSI) on the Skull Valley Goshute Indian Reservation. The EIS lists only twenty dry cask ISFSIs in operation (all but three of these located at operating reactor sites). EIS at 1-8. However, this number is grossly out-of-date. Since the time the EIS was issued in 2001, many nuclear reactors have obtained licenses to store spent nuclear fuel in dry casks at reactor sites. Consequently, there is now no demonstrated need for storage at the PFS site.

There are 103 operating commercial nuclear reactors in the United States located at 65 sites. Shutdown reactors with spent nuclear fuel onsite are located at 14 sites. All operating reactor sites must have a spent fuel pool where fuel is stored when it is removed from the reactor (referred to as "wet storage"). In addition, after cooling in the spent fuel pool, the spent nuclear fuel rods may be reloaded at the reactor site into a canister and placed in a storage cask (referred to as "dry cask storage"). A review of dry cask storage licenses issued (or under review) by the NRC reveals that a significant number of reactors now have onsite dry cask storage:

- 40 ISFSIs (excluding PFS) are licensed by the NRC for dry cask storage.⁴⁶
- 32 sites licensed for dry cask storage take spent nuclear fuel from 61 operating reactors and 4 shut down reactors.
- 8 sites licensed for dry cask storage have only shutdown reactors.
- 4 dry cask storage licenses, covering an additional 7 operating reactors, are currently being sought by utilities.

In sum, two-thirds of all operating reactors have, or will shortly have, onsite dry cask storage and 12 out of 14 shutdown reactor sites have dry cask storage.⁴⁷ This is a significant change since NRC

⁴⁶This figure does not include the PFS offsite ISFSI or the two ISFSIs located at the DOE Idaho Engineering Laboratory (TMI-2 and Foster Wheeler ISFSIs).

⁴⁷One of the shutdown reactors, the LaCrosse Boiling Water Reactor owned by Dairyland Cooperative has only 38 MTU of spent nuclear fuel amounting to about 4 storage casks; the other, Zion Nuclear Power Station, Units 1 and 2, must wait until 2013 when its decommissioning trust fund will be sufficient to conduct decommissioning activities. See NRC Fact Sheet, *Decommissioning Nuclear*

conducted its EIS analysis. *See* EIS at 1-8.

Contrary to PFS's application and the EIS, there is now no demonstrated need for storage at PFS. If there is no need for storage at the PFS ISFSI, there is also no need for an intermodal site, which PFS says is an integral part of its project. Moreover, there is no longer a public benefit to be derived from PFS's use of public lands. PFS's "sky is falling" arguments (nuclear power plants may face premature shutdown and PFS may be the only alternative)⁴⁸ to support public benefits from its project are misleading. While DOE is still a long way from providing permanent disposal for spent nuclear fuel, the nuclear industry has readily embraced dry cask storage at reactor sites. Thus, the nuclear power industry no longer needs the PFS facility, which for many utilities will be a more costly alternative than onsite storage. NRC's EIS and PFS's application to BLM present a deficient basis for BLM to satisfy its analysis under NEPA of "need" and "no action" or its regulations, 43 C.F.R. § 2804.26(a)(2), as to the public interest.

Even if there were a demonstrated need for storage at PFS (which there is not), there is no technical reason to transport the quantity of spent nuclear fuel PFS plans for each shipment (*i.e.*, 10 metric tons of uranium per cask). As described below, to move 10 MTU per cask, PFS must employ overweight and overlength heavy haul tractor/trailers to transport the massive casks on local roads, to the detriment of the quality of the environment, competition with other users, a hazard to public safety, and a threat to national security, all of which result from PFS's use of public lands.

NEPA requires consideration of alternatives. Siting the PFS storage facility on "site B"⁴⁹ (contiguous to the licensed site A) is simply a disingenuous attempt to come up with an "alternative." Site B on the Reservation was never evaluated and, as to BLM action at the intermodal site, does not present an alternative different from PFS's use of site A.

BLM has not analyzed need and no action or other alternatives specific to its major federal action – the use of public lands for PFS's nuclear waste intermodal operations. In addition, the following description of PFS's activities, relating to its proposed intermodal operations, demonstrates why the EIS prepared by the NRC does not support an affirmative decision by BLM and why any approval by BLM would be in derogation of NEPA, FLPMA and BLM's right-of-way regulations.

Power Plants (see <http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/decommissioning.html>); *Final Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada*, Vol. 2 at A-15 (Feb. 2002).

⁴⁸*See* PFS Application to BLM answer to question 15.

⁴⁹This alternative is mentioned in BLM's Federal Register notice, 71 Fed. Reg. 6286, 6288.

2. The Unanalyzed Environmental Impacts and Safety Hazards Resulting from PFS's Use of Public Lands Present Grounds for BLM to Reject PFS's Application.

The PFS project will generate the rail shipment of up to 4,000 casks of spent nuclear fuel from reactors sites, primarily located in the eastern United States, to PFS's proposed intermodal facility. The Holtec HI-STAR 100 transportation cask will be used for these shipments. Exhibit 6. The shipping weight of each HI-STAR 100 spent nuclear fuel transportation cask is 140 tons, its length is 25 feet, and its diameter 11 feet. Exhibit 5. At the intermodal site, PFS plans to process each spent nuclear fuel cask by off-loading it from a rail car to a heavy haul tractor/trailer. Exhibit 9. The heavy haul tractor/trailer is expected to be about 150 to 180 feet long, 12 feet wide, and use up to 100 tires to distribute a gross weight of about 225 tons. Exhibit 10.

The overweight and overlength heavy haul tractor/trailer PFS intends to use for the road transport of each spent nuclear fuel cask may be incapable of operating (or safely operating) from the proposed intermodal site to the Reservation storage site. Furthermore, the 180 foot long, 225 ton PFS heavy haul tractor/trailer conflicts with and endangers other uses of the I-80 frontage road and Skull Valley Road. These unacceptable safety hazards would be created only through BLM's grant of a right-of-way to PFS to use public lands for nuclear waste operations.

PFS has not demonstrated that it is technically capable of safely conducting transportation operations from the intermodal facility to the ISFSI located on the Reservation.⁵⁰ The proposed design of the intermodal site⁵¹ is such that a PFS heavy haul tractor/trailer must make a sharp turn out of the site onto the I-80 frontage road and 1.8 miles later the loaded tractor/trailer must navigate another 90 degree turn.⁵² The cask-carrying vehicle must be capable of traversing under the I-80 overpass (15 feet 8 inch clearance), then traveling 26 miles along the 20 foot wide Skull Valley Road. During PFS's maneuvers along the I-80 frontage road, the PFS heavy haul tractor/trailer would

⁵⁰In addition to determining whether BLM's action will significantly affect the quality of the environment, BLM must also determine under its regulations whether PFS is qualified to hold the grant and whether PFS can demonstrate the technical capability "to construct the project or operate facilities within the right-of-way." 43 C.F.R. § 2804.26.

⁵¹See Exhibit 8.

⁵²As described in more detail in Part II.F.1, since the 2001 EIS, there has been an increase in truck traffic past the intermodal site from Allied Waste's use of the I-80 frontage road. The 107 foot long Allied Waste garbage transfer trucks have difficulty making the turn from the I-80 frontage road to the approach to the I-80 underpass. (*Personal conversation between Denise Chancellor, Assistant Attorney General, and representative of Allied Waste, April 2006*). This anecdotal evidence is enough to raise serious doubt whether the 180 foot long PFS tractor trailer could successfully and safely navigate that turn. See, e.g., Exhibit 13.

encounter and endanger traffic en route to MagCorp, the 107 foot long Allied Waste garbage transfer trucks, and others vehicles using the frontage road.

Should the PFS heavy haul tractor/trailer manage to maneuver along the I-80 frontage road and clear the I-80 underpass, it must then travel 26 miles along Skull Valley Road. However, PFS is attempting to place a 225 ton, 180 foot long, 12 foot wide truck loaded with a spent nuclear fuel cask onto a road that was designed for light duty use. Again, PFS's "plan" presents a significant safety hazard and one that will cause significant environmental impacts.

Skull Valley Road is an essential access route for many crucial services (including BLM's wildfire response⁵³), businesses, and individuals. It is one of three escape routes in the event of an accident at the chemical weapons depot located in Tooele Valley. Skull Valley Road is also used as the main access route to Dugway Proving Ground, the Skull Valley Indian Reservation, and to ranches and other residences in the area.

The following is a prime example of the rural safety hazards existing along Skull Valley Road. Two large ranch owners, Castle Rock Land and Livestock, L.C. and Skull Valley Company, LTD., have lands in Skull Valley where they winter approximately 4,000 mother cows and calves, and rely extensively on Skull Valley Road to herd cattle between various pastures, for movement of farm equipment, and for cattle transportation. At times, traffic stops occur in order to move cattle and farm equipment; not infrequently livestock run loose on the road.⁵⁴ Using Skull Valley Road as the main corridor for nuclear waste shipments is incompatible with the ranching activities that have been taking place for the past 60 years. 43 U.S.C. § 1765(b) and 43 C.F.R §§ 2801.2 and 2804.26(2)

PFS's plan to ship a 140 ton cask 26 miles along a rural road is an anathema to public safety. It will create a public safety hazard and be incompatible with the existing and established use of Skull Valley Road. Id.

PFS says that it has no plans to upgrade Skull Valley Road. EIS at 2-47; 9-9. By necessity the slow moving, cask-carrying PFS vehicle will have to travel near the center of the 20 foot wide Skull Valley Road, endangering other motorists and creating precarious conditions for the spent

⁵³BLM has a fire truck stationed just off Skull Valley Road because Skull Valley is prone to wildland fires. PFS's heavy haul tractor/trailers will create an incompatible use of Skull Valley Road and a safety hazard during the wildfire season.

⁵⁴Exhibit 16 (Castle Rock, *et al.* Request to NRC for Hearing and Petition to Intervene, September 11, 1997).

nuclear fuel cask loaded with high level nuclear waste.⁵⁵ During the early stages of the project, PFS considered widening Skull Valley Road and making other improvements. PFS's "Trip Report" from a field walk-down on the PFS transportation corridor along Skull Valley Road⁵⁶ contains the following with respect to cask transportation by heavy haul via a widened Skull Valley Road:

- The design and/or strength of the existing road is not known.
- The road will require widening to provide two 12 foot lanes with 3 foot paved shoulders (for a total heavy haul lane of 15 feet) and 5 foot compacted gravel shoulders.
- It may be desirable to have road turnouts every 5 miles, on alternating sides of the road.
- Drainage ditches on both sides of the road will require rework.
- Existing drainage culverts under the road will need to be evaluated for both flow design capacity and wheel loadings.
- An existing aqueduct (size and depth unknown) which crosses beneath the road approximately 6 miles south of Timpie will require investigation to verify structural load capacity.
- Underground utilities along both sides of the road may require relocation and/or improvements, particularly at the three ranches located close to the road.
- Approximately 42 side road connections and driveways will require regrading and resurfacing to match the improved road.
- Road widening may impact wetland setbacks at Horseshoe Springs Wildlife Management Area and the Horseshoe Knolls lookout and campground.
- Proximity of road construction and widening may create environmental impacts to springs (*e.g.*, series of springs located within a few hundred feet west of Skull Valley Road approximately 14 miles south of Timpie).
- Raptor nests located, according to BLM, in trees (primarily at ranch sites) may require

⁵⁵See Exhibit 17 (Declaration of Benjamin Huot and schematic of heavy haul truck on Skull Valley Road).

⁵⁶See Exhibit 18 (Trip Report, Transportation Corridor Evaluation, February 23 and 24, 1997).

protective measures (*e.g.*, no construction within ½ mile of an active raptor nest between March 1 and July 15).

- Construction at the intermodal facility may be subject to seasonal restrictions and protection measures due to the presence of endangered and sensitive species at the state-owned Timpie Springs Wildlife Management Area.⁵⁷

Since PFS's 1997 Trip Report, nothing has changed with respect to the size of the PFS heavy haul tractor/trailer or the type of cask it will carry.

The foregoing vividly illustrates that PFS considered the existing Skull Valley Road unsuitable for its heavy haul transportation corridor from I-80 to the Reservation. BLM should reach the same conclusion as PFS did in 1997. Furthermore, the EIS evidences that Skull Valley Road may not support PFS's heavy haul traffic:

During 1982 and 1983, much of the State of Utah experienced unusually high annual precipitation [*i.e.*, 38 cm (15 inches) and 33 cm (13 inches), respectively, compared to an annual average of 20 cm (7.7 inches)]. Adverse effects on the stability of Skull Valley Road were noted. According to Kaliser (1989), Skull Valley Road was softened sufficiently that two heavy transport carriers were adversely affected. One vehicle sank into the asphalt, presumably because of softening of road fill under the pavement, and the other overturned. It is not apparent that substantial improvements have been made to Skull Valley Road to prevent similar occurrences.

EIS at 3-11. BLM's approval of PFS's application would result in a safety hazard being placed on a rural highway, endangering the lives of others, and creating unsafe conditions for the transport of high level nuclear waste, as well as causing severe road damage and other environmental impacts. *See also* 43 U.S.C. § 1765(b) and 43 C.F.R. §§ 2801.26 and 2804.26(a)(2)-(5).

NRC's 2001 EIS is outdated and does not evaluate the environmental and safety impacts that ensue from an affirmative decision by BLM to allow PFS to use public lands.⁵⁸ PFS would generate 4,000 trips on Skull Valley Road to transfer loaded casks of spent nuclear fuel to the Reservation site (plus as many return shipments of empty transportation casks). The environmental and safety impacts described above are severe and present grounds for BLM to deny PFS's

⁵⁷In 1997, PFS had proposed an intermodal facility on public lands closer to the junction of I-80 and Skull Valley Road than in the current application under review.

⁵⁸For example, the EIS does not evaluate the effect of PFS's intermodal operation on new and existing users of the I-80 frontage road or its impact on adjacent lands. Nor does the EIS account for the collective impacts of the Balefill and PFS's operations. *See* Section F, following.

application. See 43 U.S.C. § 1765(b); 43 C.F.R. §§ 2801.2, and 2804.26.

3. The Specific Acreage That Is the Subject of PFS's Application for the Use of Public Lands Requires Further Public Notice and NEPA Analysis.

BLM's latest Federal Register notice says the intermodal facility "would occupy 9-11 acres of BLM land approximately 2 miles west of the intersection of I-80 and Skull Valley Road . . ." 71 Fed. Reg. 6288. The EIS for the PFS project makes a similar representation:

The right-of-way parcel for the ITF would be approximately 300 m (1,000 ft) long and 100 m (350 ft) wide. The parcel would be connected to the existing frontage road by way of a new 9-m (30-ft) wide asphalt-paved road within a corridor of approximately 80 m by 30 m (270 ft by 100 ft). A new rail siding would also be constructed as part of the ITF. The total area of the ITF parcel is about 3.6 ha (9 acres). The total project area would be about 4.4 ha (11 acres), including 0.8 ha (2 acres) of land for the proposed new rail siding which would be located entirely on the existing Union Pacific right-of-way (see Figure 2.14).

EIS at 2-43.

PFS is not requesting a right-of-way over public lands for 9 acres (or 11 acres). PFS's latest application for a right-of-way at the intermodal site, dated November 22, 1999, is for approximately 21 acres. PFS describes the site as 1,400 feet long by 650 feet wide.⁵⁹

Accordingly, both NRC's EIS and BLM's Federal Register notice contain incorrect information as to the specific acreage that is the subject of PFS's request. At a minimum, BLM should verify the size of the parcel of public lands that is the subject of PFS's application, correctly inform the public and allow public comment on any expanded acreage that has not previously been noticed, and perform an accurate NEPA analysis on the acreage requested in PFS's current right-of-way application.

F. Allowing PFS to Use Public Lands for a Nuclear Waste Intermodal Facility Will Interfere with Users of the Area Adjacent to the Intermodal Site, Will Not Be in the Public Interest, and Will Create a Competitive Disadvantage to Others.

Under FLPMA, BLM must protect lives and property, other lawful users, and the public interest in lands adjacent to the right-of-way. 43 U.S.C. § 1765(b). In addition, FLPMA requires

⁵⁹If these dimensions are correct, then so is the acreage because 1400 ft. x 650 ft. = 910,000 sq. ft. There are 43,560 sq. ft. in an acre. Therefore, 910,000 sq. ft. ÷ 43,560 sq. ft./acre = 20.9 acres.

BLM to evaluate the intended use of the right-of-way, "including its effect on competition." 43 U.S.C. § 1761(b)(1). BLM's regulations also require it to protect adjacent lands, coordinate its actions with interested individuals, and State and local governments, and to deny an application if it is not in the public interest. 43 C.F.R. §§ 2801.2(a) and (d), 2810.26(2). Any favorable BLM action on PFS's application would be in violation of the foregoing legal requirements.

1. Allied Waste Lakeside Municipal Waste Landfill at Lakeside.

In August 2005 Allied Waste began operating a municipal solid waste landfill at Lakeside, Utah. Access to the landfill is from the I-80 frontage road that leads to MagCorp. The landfill is licensed to cover 2,000 acres and its operational life is expected to be 50 years or longer. Large semi-trailer transfer trucks haul garbage to the landfill via I-80 to the Rowley Junction/Timpie exit. These semi-trailers and other large trucks will use the I-80 frontage road and travel past PFS's proposed intermodal site. The current average volume of Allied Waste's traffic is 67 trucks per day, the vast majority of which are 107 foot long trucks with trailers (truck doubles), hauling approximately 125,000 lb. loads. By 2008 or 2010 the volume of truck doubles is expected to increase by up to 25 trucks per day. In addition, the volume of traffic could increase significantly beyond these projected numbers for specific projects.⁶⁰

There will be competition for use of the roadway when PFS's heavy haul trucks attempt to turn out from the intermodal site onto the I-80 frontage road. A PFS cask-carrying truck will also choke off any other use of the roadway when it attempts to make the ninety degree turn from the I-80 frontage road onto the road leading to the I-80 underpass. Provided the PFS vehicle is capable of making the turn from the frontage road, it will then ensnarl traffic as it attempts to fit under the 15 ft. 8 inch high I-80 overpass. *See* Exhibits 13 and 14. Cognizant of PFS's transportation plans, BLM should not issue PFS a right-of-way for the intermodal site because the result would endanger lives and property, disregard the public interest, and create a competitive disadvantage to existing commercial traffic that uses the I-80 frontage road. BLM must adhere to its regulations and deny PFS's application. 43 C.F.R. §§ 2801.2(a) and (d), 2810.26(2); *see also* 43 U.S.C. §§ 1761(b)(1) and 1765(b).

2. The Balefill on the Skull Valley Goshute Indian Reservation.

Not only will PFS's use of the intermodal site cause a safety hazard to the Allied Waste garbage transfer semi-trailers, but the oversized, overweight PFS cask-carrying trucks will present a hazard on Skull Valley Road to the newly built balefill located on the Skull Valley Indian Reservation. Waste destined for the balefill is packaged in 4 ft. x 4 ft. x 6 ft. bales loaded onto a flat bed semi-trailer truck and transported from I-80 to the Reservation. Balefill traffic from the I-80 Rowley

⁶⁰Exhibit 19 (email from Kirk Treece, General Manager, Wasatch Regional Landfill, April 10, 2006).

Junction exit to the Reservation along Skull Valley Road is estimated at 130 to 160 truck trips per day, each carrying 25-30 tons, as well passenger traffic.⁶¹ The slow-moving PFS's heavy haul trucks passing by the I-80 exit and along Skull Valley Road could cause balefill traffic to back up on I-80. Again, BLM cannot comply with FLPMA or its regulations in granting a right-of-way to PFS.

3. Adjacent Utah Trust Lands

In the Enabling Act of 1894, Congress granted Utah, upon admission to the Union (which it entered in 1896), four numbered sections in each township for the support of public schools.⁶² Today those school trust lands are still maintained and managed to support Utah's school children and public schools.

There are a number of Utah school trust land sections that surround the proposed PFS intermodal site.⁶³ The federal government has an ongoing obligation to further the interests of land-grant beneficiaries it created at statehood. To grant PFS the right to use the intermodal site to conduct nuclear waste operations would not further those interests. Instead, those allowed PFS's uses would stigmatize and diminish the value of adjacent trust lands.⁶⁴ Accordingly, PFS's proposed use is against the public interest and inconsistent with Utah's Enabling Act and presents grounds under 43 C.F.R. § 2804.26(2) and (4) to deny a right-of-way grant to PFS.

The State is also concerned about the absence of any contingency measures to deal with leaking or non-conforming spent nuclear fuel casks. PFS has no plan, except return shipment across country, for dealing with casks that leak or become compromised. Over the 50 year right-of-way term PFS is requesting for operating the intermodal facility, it is likely that some casks will not be accepted for return interstate shipment (*e.g.*, by Union Pacific Railroad or by the rail workers' union), and those casks would remain at the intermodal site. This situation is alarming to the State because Utah trust lands actually abut the intermodal site. Not only would PFS's use of those lands diminish the economic value of Utah trust lands, but PFS's use of land adjacent to Utah trust lands would also create a significant and on-going safety hazard. Again, the use to which PFS intends to put public lands is not in the public interest and, furthermore, PFS has not demonstrated that it is technically capable of safely operating the intermodal site. *See* 43 C.F.R. § 2804.26 (2) and (5).

⁶¹*See Draft Environmental Impact Statement Tekoi Balefill Project on the Skull Valley Band of Goshute Indians Reservation*, Bureau of Indian Affairs, Feb. 2004, at 4-67.

⁶²*See* Enabling Act Section 6, July 16, 1894, 28 Stat. 107.

⁶³Exhibit 20 (Map showing Utah trust lands adjacent to intermodal site prepared by State Institutional Trust Lands Administration); *see also* <http://www.ut.blm.gov/NewsReleases/mar17.pdf>

⁶⁴*See City of Santa Fe v. Komis*, 114 N.M. 659, 845 P.2d 753 (1992) and Section G below.

4. Other Users

Skull Valley Road has long and established uses that are incompatible with PFS using that road for its transportation corridor. The roadway is used as one of only three escape routes for the chemical weapons incinerator; the main route for shipments and traffic to Dugway Proving Ground; and used extensively for cattle and farming operations and transportation. *See* section, E.2.

5. Effects on Competition.

The State has not conducted a comprehensive investigation into the effects PFS's use of the intermodal site will have on competition. It has, however, presented sufficient information to BLM to show that there will be some negative impact to businesses who must compete with the massive PFS heavy haul trucks for the use of the I-80 frontage road and Skull Valley Road.

Certainly the EIS contains no analysis of competition or of the costs and benefits from PFS's use of the intermodal site. While NRC presented its analysis of the costs and benefits of a centralized nuclear waste storage facility in Chapter 8 of the EIS, BLM took no part in that analysis. EIS, at 8-1, n.1. In sum, BLM cannot satisfy FLPMA's requirement to evaluate the effects on competition from the grant of a right-of-way. *See* 43 U.S.C. § 1761(b)(1).

G. The Public Interest and Public Policy Do Not Lie in Granting PFS a Right-of-Way.

Granting PFS a right-of-way for the intermodal site would create bad public policy and be detrimental to the public interest. Utah is renowned for its quality of life, access to outdoor recreation, and business friendly climate. Continuous high level nuclear waste shipments through the heavily populated Wasatch Front and through the heart of downtown Salt Lake City, as well as the storage of nuclear waste casks beside I-80, have the potential of branding Utah as this country's high level nuclear waste dumping ground. In addition, the risk of a terrorist attack at the intermodal facility, less than 40 miles from the outskirts of Salt Lake City, or risk of a nuclear accident, will damage Utah's business and tourism industries.

One of the main engines driving Utah's economic development is its ability to attract new business development and capital investments. Business relocation and headquarters decisions will be impacted merely by the prospect of a terrorist attack or nuclear accident at the intermodal facility. Furthermore, Utah's \$2 billion dollar tourism industry⁶⁵ will also suffer from Utah being considered a nuclear dumping ground. In addition, property values along the PFS rail transportation route in Utah, as well as the potential development of Skull Valley as a bedroom community over the next 50

⁶⁵*Why not visit Utah's backyard; Hometown fun: Tourism officials are encouraging residents to discover the diversity of local attractions, Salt Lake Tribune, April 27, 2006, http://www.sltrib.com/contentlist/ci_3756338*

years,⁶⁶ will be diminished.

The perception of economic harm, certainly as it relates to property values, is a legitimate concept for BLM to consider. In City of Santa Fe v. Komis, 114 N.M. 659, 845 P.2d 753 (1992) the New Mexico Supreme Court addressed perception and property value in a partial condemnation proceeding, where land was taken for the construction of a highway to transport nuclear waste to the Waste Isolation Pilot Project site near Carlsbad, New Mexico. The court answered in the affirmative, the specific issue before it: “whether the public fear of this use [nuclear waste shipments], whether well-founded or not, which causes a diminution in value to the remaining land not taken, is compensable.” 845 P.2d at 755. The court found the actual safety of nuclear materials shipments to be irrelevant and instead focused on whether the loss of property value can be proven⁶⁷ (e.g., by opinion polls), and if so, it should be compensated. 845 P.2d at 756-757.

The potential economic harm to the State and its citizens from PFS's use of public lands is not in the public interest.

III. Because the Pony Express Resource Management Plan Prohibits Public Lands to Be Used for PFS's Intended Purposes, BLM Cannot Approve PFS's Application but it May Deny It.

A. The Pony Express Resource Management Plan Prohibits Public Lands to Be Used for PFS's Intended Use.

Resource management plans are the keystone to BLM's management of federal public lands. 43 U.S.C. § 1712. The Pony Express Resource Management Plan (RMP) documents public land management and use applicable to PFS's right-of-way applications for its proposed intermodal facility and rail corridor. None of the uses described in the Pony Express RMP allow for the construction and operation of high level nuclear waste storage and transfer operations at Rowley Junction/Timpie.⁶⁸

Significantly, the Pony Express RMP has a policy that bars hazardous materials on public lands: “Public land will not be made available for inappropriate uses such as storage or use of

⁶⁶See e.g., Exhibit 16 at 5, 7, 13-14, 18.

⁶⁷Such as, if people will not purchase property because they fear living or working on or near a nuclear waste shipment route. Id.

⁶⁸As described in Part II.B, PFS's intermodal facility will be a choke point for shipments to the Reservation and, as such, spent nuclear fuel casks will continually be stored at the intermodal site.

hazardous materials . . .” RMP at 4. The RMP also provides: “no further authorizations will be made for the treatment, storage or disposal of hazardous waste on public lands.” RMP at 29.

The spent nuclear fuel (a type of high level radioactive waste) contained in the casks to be handled and stored at the intermodal site is a hazardous material and a hazardous waste. BLM regulations define “hazardous material,” in part, as “[o]ther substances applicable Federal, state, tribal, or local law define and regulate as “hazardous.”” 43 C.F.R. § 2801.5.

Evidence that spent nuclear fuel is a hazardous material is found in the fact that its transportation is regulated by the U.S. Department of Transportation (DOT) under federal hazardous materials laws (*e.g.*, 49 U.S.C. Chapter 51, Transportation of Hazardous Material; and 49 C.F.R. Chapters I and III).⁶⁹ The EIS for the PFS project, for which BLM is a cooperating agency, recognizes that spent nuclear fuel is regulated by DOT as a hazardous material. EIS at 1-26. Further evidence that spent nuclear fuel is a hazardous material is found in the EIS under “Emergency Response,” where an accident involving spent nuclear fuel is treated the same as a hazardous materials accident. EIS at 5-53.

It is incumbent upon BLM to adhere to its policy barring storage of hazardous materials on public lands, including no storage of spent nuclear fuel on lands PFS wants to use for its intermodal facility. BLM must, therefore, deny PFS’s application because its use of the right-of-way would be an inappropriate use of public lands.

Spent nuclear fuel, a high level radioactive waste, can also be considered a hazardous waste. For example, in the Nuclear Waste Policy Act Congress recognizes that high-level radioactive waste and spent nuclear fuel create potential risks; these materials “have become major subjects of public concern and appropriate precautions must be taken to ensure that such waste and spent fuel do not adversely affect the public health and safety of the environment for this or future generations.” 42 U.S.C. § 10131(a)(1) and (7). Clearly, Congress considers spent nuclear fuel to be hazardous. Therefore, by necessity, BLM’s requirement that “no authorizations will be made for the storage of hazardous waste on public lands” does not authorize the storage of a deadly nuclear waste substance, spent nuclear fuel. Accordingly, BLM must deny PFS’s application because storage of spent nuclear fuel it is not authorized under the Pony Express RMP.

Finally, BLM may not grant a right-of-way when “BLM identifies areas in its land use plans or in the analysis of an application as inappropriate for right-of-way uses.” 43 C.F.R. §

⁶⁹NRC’s role in the transportation of spent nuclear fuel is limited to 10 C.F.R. Part 73 (physical security) and Part 71 (packaging and preparation for shipment); NRC recognizes that DOT has jurisdiction over the means of transportation. 10 C.F.R. § 71.0(b). *See also* PFS, CLI-04-04, 59 NRC 31, 38 (2004) (“ . . . NRC and Department of Transportation regulations . . . hold spent fuel in transit to fall under DOT’s jurisdiction”).

2802.10(a)(3). Furthermore, BLM may deny a right-of-way application if “[t]he proposed use [described in the right-of-way application] is inconsistent with the purpose for which BLM manages the public lands . . .” *Id.* § 2804.26(a)(1). PFS’s desired use of public lands to conduct high level nuclear waste storage, handling, and processing is an inappropriate use of federal public lands and inconsistent with BLM’s plan for management of those lands. Therefore, pursuant to 43 C.F.R §§ 2802.10(a)(3) and 2804.26(a)(1), BLM must deny PFS’s application.

B. If BLM Desired to Grant a Right-of-Way to PFS for the Intermodal Site, BLM Would First Be Required to Amend the Pony Express RMP.

The current Pony Express RMP and BLM right-of-way regulations do not provide a legal basis for BLM to grant PFS a right-of-way for the intermodal site. Should BLM consider approving PFS’s right-of-way application, it must first amend the Pony Express RMP.

The Utah Office of the BLM states on its website:

The land-use planning process allows for extensive public involvement and provides a blueprint of how the public land should be managed. BLM Utah’s mission is to sustain the health, diversity and productivity of the public land, and land-use planning is a *[sic]* vital to our mission.

See <http://www.ut.blm.gov/landuseplanning/index.htm>. There has been no public involvement in land use planning for the high level nuclear waste activities PFS intends to conduct on public lands. While BLM has acknowledged that the Skunk Ridge rail spur would require amendment of the Pony Express RMP, it incorrectly says in its Federal Register notice:

The ITF would not require an amendment to the Pony Express RMP. The ITF would occupy previously disturbed land lying between the existing Union Pacific Railroad and Interstate 80.

71 Fed. Reg. 6288.

FLPMA clearly states that the development and revision of land use plans requires public involvement:

The Secretary shall, with public involvement and consistent with the terms and conditions of this Act, develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands. Land use plans shall be developed for the public lands regardless of whether such lands previously have been classified, withdrawn, set aside, or otherwise designated for one or more uses.

43 U.S.C. 1712(a) (*emphasis added*). None of BLM's many Federal Register notices about the PFS project calls for any public input into amending the Pony Express RMP for the intermodal site. As described above, and contrary to BLM's position, the RMP must be amended in order for BLM to comply with FLPMA and its right-of-way regulations for the grant of a right-of-way allowing the conduct of hazardous materials and nuclear waste activities at the intermodal site. Whether or not the land has been previously disturbed does nothing to overcome the prohibition on the use of public lands to conduct nuclear waste or hazardous material storage, processing, handling and other operations.

There may be occasions when, for example, light industrial use of the same site would not trigger an RMP amendment. However, PFS's proposal is so exceptionally out of character with all other land uses in the existing RMP that the RMP cannot accommodate that use. Fifty years of processing through the intermodal site one of the most deadly wastes this country produces cannot be compared to the current ranching, farming, and recreational uses presently allowed under the RMP. Accordingly, BLM would have to amend the RMP if it were to consider granting PFS a right-of-way.

C. BLM Cannot Amend the RMP or Grant a Right-of-Way to PFS for the Intermodal Site Unless and Until the Department of Defense Complies with Section 2815 of the National Defense Authorization Act for Fiscal Year 2000.

Section 2815 of the National Defense Authorization Act for Fiscal Year 2000 requires the Secretary of Defense to conduct a Readiness Impact Study of Utah National Defense Lands. The required study is of public lands under BLM's jurisdiction, "that are adjacent to or near the Utah Test and Training Range and Dugway Proving Ground or beneath the Military Operating Areas, Restricted Areas, and the airspace that make up the Utah Test and Training Range." Section 2815(a), Pub. L. 106-65, 113 Stat. 852. Unless and until the Secretary of Defense submits a report to Congress containing the results of the Readiness Impact Study, the Secretary of Interior (including BLM) may not proceed with the amendment of a resource management plan affecting Utah National Defense Lands or conduct any statewide environmental impact statement affecting such lands. *Id.* Section 2815(d). The Secretary of Defense has not yet conducted the Readiness Impact Study.

If BLM needs to amend the Pony Express RMP – which clearly it must for the intermodal site (*see* above) – then BLM recognizes:

Any amendment to . . . [the Pony Express] RMP would also await compliance by the Department of Defense with certain reporting duties under section 2815 of the National Defense Authorization Act for FY 2000, Pub. L. 106-65.

71 Fed. Reg. 6288. While BLM made the foregoing statement in relation to the Skunk Ridge (Low) rail corridor, it nonetheless equally applies to the required amendment to the Pony Express RMP to

change established land use management that prohibits hazardous materials or storage of hazardous waste on public lands. Consequently, the planning restrictions on BLM apply with equal force to BLM's decision on whether it can grant PFS a right-of-way for the Low rail corridor as they do to the intermodal site.⁷⁰ In sum, BLM may not amend the Pony Express RMP unless and until the Department of Defense complies with the Readiness Impact Study.

D. BLM Can Act Now to Deny PFS's Right-of-Way Application but it Cannot Proceed to Approve Any Right-of-way Applications Unless and Until it Amends the Pony Express RMP and the U.S. Department of Defense Complies with Pub. L. 106-65.

The BLM may act now to deny either or both of PFS's right-of-way applications. BLM, however, cannot grant a right-of-way to PFS unless and until it has amended the Pony Express Resource Management Plan, and potentially, until after the Bureau of Indian Affairs (BIA) has issued a record of decision determining that it may approve the PFS-Band lease.

The PFS project has triggered a NEPA analysis by NRC, BIA, BLM and the Surface Transportation Board (STB) because each agency's separate action is "[a] major federal action[] significantly affecting the quality of the environment." 42 U.S.C. § 4332(2)(C). The four agencies agreed to cooperate in the preparation of a single EIS because their actions are interrelated. NRC is the lead agency and BIA, BLM, and STB are cooperating agencies. EIS at 1-15.

The final Environmental Impact Statement for the PFS project states: "BLM's action – dependent on NRC issuing a license and BIA approving a lease – is to issue a right-of-way grant under 43 C.F.R. Part 2800 for the rail line, or for the ITF, or to deny both applications." EIS at 1-17. BLM notes, however, that the applicant's preferred alternative is the all rail option along Skunk Ridge (*i.e.*, due south from Low along the base of the Cedar Mountains then east into the Reservation) and that the final EIS "will serve as the NEPA document for BLM's determinations with respect to granting a right-of-way and the proposed plan amendment, should BLM approve the rail line right-of-way." *Id.*

Section 2815 of the National Defense Authorization Act for Fiscal Year 2000 places planning restrictions on the approval of a right-of-way that requires an amendment of the Pony

⁷⁰BLM has not analyzed the effect of PFS's use of the intermodal site would have on encroachment on the use of UTTR or on the mission of Hill Air Force Base. For example, to access the northern area of UTTR South, F-16 fighter jets from Hill Air Force Base fly directly over the intermodal site and shortly thereafter, when the flight is handed off from Salt Lake City to Clover Air Control, the F-16s access the Range from the northern part of the Sevier B Military Operating Area. *Personal conversation between Denise Chancellor and Connie Nakahara and Utah aircraft experts and former HAFB F-16 pilots pilots, Lt. Col. Hugh Horstman and Lt. Col. Louis McDonald (USAF Ret.)* (May 2, 2006). See also Part II.D.2 above.

Express RMP; denial of a right-of-way application is not affected. Therefore, the grant of the intermodal right-of-way would trigger the National Defense Act planning restrictions on BLM.

Each cooperating agency has separately entered into an Agreement with NRC that documents the procedures and responsibilities of NRC and the cooperating agency. Nothing in these agreements designates the order in which each agency must act on PFS's various applications. Furthermore, the Agreement has no effect on each agency's authority.⁷¹

Two Federal Register notices describe a sequence in cooperating agency approvals in which BLM's approval (but not denial) of a right-of-way will come after NRC and BIA have, respectively, granted approvals to PFS. BLM's notice advising of the availability of the draft EIS and Proposed Plan Amendment to the Pony Express RMP,⁷² says "[t]he BLM decision to grant a right-of-way to PFS would be dependent upon the decisions made by the NRC and BIA." 65 Fed. Reg. 39,174, 39,175 (June 23, 2000). Identical language appeared on the same date in the four agencies' notice of public meetings and availability of the draft EIS. *Id.* at 39,208. The notice further stated if NRC issues a license and BIA approves the lease, "then BLM's preferred alternative would be to amend the Pony Express [RMP] and issue the right-of-way [for the rail corridor] . . ." *Id.* No other Federal Register notice appears to discuss the sequence of BLM's decision with the other agencies' approvals.

BLM right-of-way regulations do not impede BLM from taking action now to deny PFS's application. BLM processes a right-of-way application by completing a NEPA analysis; determines whether the requested use complies with federal and state laws; consults with other governmental entities; holds public meetings and issues public notices; and takes any other action necessary to fully evaluate the application. 43 C.F.R. § 2804.25(d).

BLM's denial of a right-of-way application does not require it to await a final BIA decision on the lease. Rather, BLM's denial of the PFS right-of-way applications should not be judged by when BLM issues its decision but whether its denial complies with 43 C.F.R. Part 2800. The same cannot be said for approval of the intermodal right-of-way site. BLM cannot act on that application unless and until it amends the Pony Express RMP, DOD has complied with Section 2815 of the National Defense Authorization Act for Fiscal Year 2000, Pub. L. 106-65, and BLM obtains more information from PFS and supplements the EIS issued by NRC in December 2001.

⁷¹See e.g., NRC-BLM October 1998 Agreement, § IV.A ("Nothing in this agreement will be construed as affecting the authorities of the participating agencies or as binding beyond their respective authorities or to require either agency to obligate or expend funds in excess of available appropriations or contributions by the applicant.").

⁷²BLM intends to adopt the EIS as a basis for its plan amendment decision. 65 Fed. Reg. 39,174 (2000).

*State of Utah Comments to BLM
on PFS's Right-of-Way Applications
May 8, 2006*

IV. Conclusion

Judged by applicable legal requirements and the current administrative record, there is only one supportable decision BLM can make: deny both PFS right-of-way applications.

**STATE OF UTAH COMMENTS ON RIGHT-OF-WAY APPLICATIONS
BY PRIVATE FUEL STORAGE, LLC
TO USE PUBLIC LANDS FOR NUCLEAR WASTE ACTIVITIES**

May 8, 2006

LIST OF EXHIBITS

- Exhibit 1: Area Map of PFS's proposed transportation routes, PFS License Application to NRC ("LA")(Rev.2) Figure 1-1.
- Exhibit 2: Map accompanying the Cedar Mountain Wilderness Legislation.
- Exhibit 3: Declaration of Jean Braxton and overlay of PFS's rail route on the Cedar Mountain Wilderness map.
- Exhibit 4: *Salt Lake Tribune* article on Tooele County (April 23, 2006).
- Exhibit 5: HI STAR 100 Assembly for Transport (from HI-STAR Safety Analysis Report, NRC Docket No. 71-9261); and photograph of spent nuclear fuel transportation cask with impact limiters and tie downs.
- Exhibit 6: Prototype of PFS's spent nuclear fuel rail car and cask.
- Exhibit 7: Map of Utah showing one and five mile areas around potential PFS rail routes.
- Exhibit 8: Exhibit 8 (PFS Environmental Report to NRC ("ER") (Rev.12), Figure 3.2-1; and ER (Rev.7), App. 4A, Figure 7, color photograph of artist rendering of intermodal facility, looking north from the I-80 median).
- Exhibit 9: Heavy haul tractor/trailer truck, including EIS, Fig. 2.15.
- Exhibit 10: Letter from Ed Boon, Aspen Trailer Group, to Wayne Lewis, Stone & Webster.
- Exhibit 11: PFS Application to Utah Department of Commerce for Foreign Limited Liability Company Certification of Registration (March 27, 1997).
- Exhibit 12: Letter from Commissioner Robert L. Flowers, Utah Department of Public Safety (May 2, 2006).
- Exhibit 13: Photographs of I-80 underpass.
- Exhibit 14: Excerpt from Deposition Transcript of PFS witness John L. Donnell (May 27, 1999).
- Exhibit 15: Letter from G. William Lamb, BLM State Director, to Dr. Edward Y. Shum, NRC Spent Fuel Project Office (June 30, 1998).

Exhibit 16: Castle Rock, *et al.* Request to NRC for Hearing and Petition to Intervene (September 11, 1997).

Exhibit 17: Declaration of Benjamin Huot and schematic of heavy haul truck on Skull Valley Road.

Exhibit 18: PFS Trip Report, Transportation Corridor Evaluation (February 23 and 24, 1997).

Exhibit 19: Email from Kirk Treece, General Manager, Wasatch Regional Landfill (April 10, 2006).

Exhibit 20: Map showing Utah trust lands adjacent to intermodal site prepared by State Institutional Trust Lands Administration.